

revenues; (3) whether, in jurisdictions where incumbent LECs bill their end-users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and (4) whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.

Declaratory Ruling, ¶24, pp.15 and 16. GTE cannot deny that, (1) GTE serves ESPs and ISPs out of its intrastate, Virginia SCC tariffs, (2) the revenue GTE has received from serving such ESPs and ISPs is counted as intrastate revenue, (3) where GTE bills its end-users by message or measured units, calls from GTE's customers to ESPs or ISPs are charged as such, and (4) if ISP traffic were not treated as local and subject to reciprocal compensation, there would be no compensation for an ILEC or CLEC delivering this traffic to an ISP. No hearing is needed to establish these facts.

III. This Commission and those in other states have ruled ISP traffic to be compensable without receiving evidence.

Other state commissions have decided ISP compensability in light of the FCC's Declaratory Ruling.⁴ Several have done so without resorting to an evidentiary hearing. For example, The Oregon P.U.C. made its decision on compensability by granting, in part, a motion for summary judgment. Similarly, the attached Rhode Island decision indicates that the Commission was able to rule on the basis of the pleadings and the NEVD/BA-RI Agreement, without conducting an evidentiary hearing. Moreover, just as this Commission construed the Cox/BA-VA interconnection agreement from its four corners, it may likewise construe the Cox/GTE interconnection agreement without resorting to extrinsic evidence.

⁴ A partial listing is contained in footnote 3 of Cox Reply of July 19, 1999.

IV. The delay encompassed in conducting an evidentiary hearing works only to the advantage of GTE.

As Cox already has explained in its previous filings, the Interconnection Agreement requires that GTE make payments to Cox, even though GTE may dispute them. Yet, GTE has refused to make any payments for reciprocal compensation to Cox. An evidentiary hearing means additional delay which, in turn, means more time for GTE to hold fast to its cash and to deprive Cox, its competitor, the revenue that is due under the Agreement. As a result, should the Commission should find it necessary to conduct an evidentiary hearing, Cox would encourages an expeditious hearing process and would request that this Commission enter an interim order requiring that GTE pay either to Cox or into an escrow account the amounts that Cox has billed GTE.

V. Conclusion

For the reasons discussed here and in the Cox Reply of July 19, 1999, Cox respectfully requests that the Commission determine as a matter of law that ISP traffic is compensable within the meaning of the Cox/GTE Interconnection Agreement and order GTE to pay the invoices submitted by Cox together with interest.

Respectfully submitted,

COX VIRGINIA TELCOM, INC.

By Counsel

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Date: August 13, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered or mailed
first class postage pre-paid this 13th day of August, 1999, on each of the following:

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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 24, 2000

PETITION OF

STARPOWER COMMUNICATIONS, LLC

CASE NO. PUC990023

For Declaratory Judgment
Interpreting Interconnection
Agreement with GTE South, Inc.

and

PETITION OF

COX VIRGINIA TELCOM, INC.

CASE NO. PUC990046

v.

GTE SOUTH INCORPORATED

For enforcement of interconnection
agreement for reciprocal compensation
for the termination of local calls
to Internet Service Providers

FINAL ORDER

On February 4, 1999, and March 18, 1999, Starpower Communications, LLC, ("Starpower") and Cox Virginia Telcom, Inc., ("Cox") filed their respective petitions against GTE South Incorporated ("GTE"), seeking declaratory relief and enforcement of their interconnection agreements with GTE. Specifically, Starpower and Cox seek the payment of reciprocal compensation for their transport and termination of GTE's traffic to Internet service providers ("ISPs"). All pleadings have been filed by

the parties as provided in the Commission's Preliminary Order of June 22, 1999, and Second Preliminary Order of August 9, 1999.

In Case No. PUC970069,¹ Cox, in its petition for enforcement of its interconnection agreement with Bell Atlantic-Virginia, Inc. ("BA-VA"), presented the issue of payment of reciprocal compensation for its transport and termination of BA-VA traffic to ISPs served by Cox. We found in that case that calls to ISPs as described in the Cox petition constituted local traffic, and that both Cox and BA-VA were entitled to reciprocal compensation for the termination of this type of call. We found that calls to an ISP dialed on a seven-digit basis were local in nature.

Subsequent to that Order, the Federal Communications Commission ("FCC") issued an order in which it held that the jurisdictional nature of ISP-bound traffic is determined by the end-to-end transmission between an end user and the Internet.² The FCC further concluded that such ISP-bound traffic is jurisdictionally mixed and appears to be substantially interstate rather than intrastate.³

¹ Petition of Cox Virginia Telcom, Inc., For enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc., Case No. PUC970069, 1997 S.C.C. Ann. Rep. 298, Final Order (Oct. 24, 1997).

² In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking, CC Dockets 96-98 and 99-68, FCC 99-38, released Feb. 26, 1999 (hereinafter, "Reciprocal Compensation Order"), at ¶ 12.

³ Id. at ¶ 1.

In its Reciprocal Compensation Order, the FCC did not support the extension of its jurisdiction over locally dialed calls to ISPs with any rules regarding inter-carrier compensation for ISP-bound traffic. Nor has the FCC made modifications to jurisdictional separations systems that apportion regulated costs and revenues between intrastate and interstate jurisdictions.

The FCC did, however, establish a further rulemaking to consider prospective inter-carrier compensation methods for ISP-bound traffic. As part of this rulemaking, the FCC requested comment on the implications of various alternative inter-carrier compensation proposals "on the separations regime, such as the appropriate treatment of incumbent [local exchange carrier ("ILEC")] revenues and payments associated with the delivery of such traffic."⁴ In the interim, the FCC left it to state commissions to consider what effect, if any, its ruling had on state decisions regarding present reciprocal compensation provisions of interconnection agreements whether negotiated or arbitrated.⁵

This matter is of serious concern to this Commission because, notwithstanding its interstate classification of ISP-bound traffic, the FCC continues to require ILECs to account for

⁴ Id. at ¶ 36.

⁵ Id. at ¶ 27.

costs and revenues associated with end users' and ISPs' end office connections for ISP-bound traffic as intrastate for jurisdictional purposes and to require that such services be purchased from intrastate tariffs.⁶

In its Order, the FCC assures us that it has no intention of permitting a mismatch of costs and revenues between the jurisdictions.⁷ However, the FCC has yet to commit to the separations reform necessary to match the jurisdictional costs and revenues to its "newly" determined interstate jurisdiction for ISP-bound traffic.⁸ Moreover, to date the FCC has not acted in its rulemaking regarding inter-carrier compensation for ISP-bound traffic nor adopted separations reform.⁹

The FCC's stated goal in its Separations Reform NPRM was a comprehensive review of the Part 36 separations rules to

⁶ The Chief of the Common Carrier Bureau of the FCC has directed Bell Atlantic and SBC Communications to reclassify their ISP-bound expenses and revenues as intrastate in their ARMIS reporting. See "Common Carrier Bureau Issues Letter To Bell Atlantic Regarding Jurisdictional Separations Treatment of Reciprocal Compensation For Internet Traffic", ASD 99-40, Released July 30, 1999.

⁷ Separations Reform Order at ¶ 36.

⁸ The time may come when the State Corporation Commission will have to consider disallowing, for ratemaking purposes, intrastate costs associated with carrying ISP-bound traffic even though the FCC continues to require these costs to be apportioned intrastate.

⁹ In re Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22122 (1997) (hereinafter, "Separations Reform NPRM").

consider changes in the telecommunications industry.¹⁰ The Separations Joint Board is currently reviewing various proposals for separations rule changes. As part of this effort, the State Members of the Separations Joint Board have recently developed a cost study tool to help evaluate cost shift effects of separations rule changes.¹¹ To demonstrate the use of this tool the State Members estimated the possible effect of two recent FCC decisions, one of which was the Reciprocal Compensation Order. The potential misallocation of costs to the state jurisdictions appears enormous.

The cost study tool estimated costs that would be allocated to the interstate jurisdiction if the FCC had found that Internet minutes should be counted as interstate for separations purposes. The State Members reported that "it appears that the effect of moving Internet minutes to the interstate jurisdiction would be a shift in costs of about \$2.8 billion annually nationwide (about \$1.40 per line per month) to the interstate jurisdiction."¹²

¹⁰ "The fundamental basis on which separations are made is the use of telecommunications plant on each of the [interstate and intrastate] operations." (47 C.F.R. § 36.1(c)).

¹¹ See "Formal Request from State Members For Notice and Comment on Separations Simulation Cost Study Tool", filed October 28, 1999, in the FCC proceeding captioned In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, CC Docket 80-286. The FCC requested comments on the cost study analysis tool by December 17, 1999.

¹² Id.

Based on the FCC's failure to act on either inter-carrier compensation or separations reform for ISP-bound traffic, we conclude that the Reciprocal Compensation Order has created great regulatory uncertainty. In the absence of any FCC rules on inter-carrier compensation for ISP-bound traffic, any interpretation of the instant agreements we might reach may well be inconsistent with the FCC's final order in its rulemaking. Further, our decision on these agreements might also conflict with the FCC's ultimate resolution of the separations reform issues, which also remain unresolved.

Given the possibility of conflicting results being reached by this Commission and the FCC, we believe the only practical action is for this Commission to decline jurisdiction and allow the parties to present their cases to the FCC. The FCC should be able to give the parties a decision that will be compatible with any future determinations that it might issue. Being unable to determine the FCC's ultimate resolutions of these issues, any decision by us would be compatible with such rulings only by coincidence.

We further conclude that the FCC's Reciprocal Compensation Order, to the extent it intends to confer regulatory jurisdiction, is of dubious validity. The FCC has concluded that ISP-bound traffic is "jurisdictionally mixed and appears to

be largely interstate" in nature.¹³ Nevertheless, the FCC has suggested that the states should continue to approve and construe interconnection agreements that establish compensation for transport and termination of ISP-bound traffic, because "neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by Section 251(b)(5), so long as there is no conflict with governing federal law."¹⁴

The Commission is a constitutional agency that derives all of its powers and authority from the Constitution of Virginia and properly enacted legislative measures. A statement by the FCC does not, per se, grant jurisdiction to this Commission. Thus, even if we could, by chance, respond to the petitions in a manner not inconsistent with rules the FCC may later adopt, our ruling might be challenged on jurisdictional grounds by a party dissatisfied with the outcome.¹⁵

Therefore, upon full consideration of the pleadings, the Reciprocal Compensation Order, and the applicable statutes and rules, we find we should take no action on the petitions. We

¹³ Reciprocal Compensation Order at ¶ 1.

¹⁴ Id. at ¶ 26.

¹⁵ We will not comment on the validity of such a challenge, but note that the invitation of the FCC for us to act in these cases may encourage such a challenge.

will dismiss these petitions without prejudice but encourage the parties to carry their requests for construction of these agreements to the FCC where they can obtain relief that should be consistent with the rules the FCC may issue in the future. It is also our hope that referring these parties to the FCC might encourage the FCC to complete its rulemaking on inter-carrier compensation and to address the separations reform issues for ISP-bound traffic. Accordingly,

IT IS THEREFORE ORDERED that the petitions in Case Nos. PUC990023 and PUC990046 are DISMISSED and, there being nothing further to come before the Commission, the papers transferred to the files for ended causes.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION



BELL ATLANTIC-VIRGINIA, INC.)
)
Plaintiff,)
)
v.)
)
WORLDCOM TECHNOLOGIES OF)
VIRGINIA, INC.,)
)
Defendant.)

CIVIL ACTION NO. 99-275-A

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant WorldCom Technologies of Virginia, Inc.'s ("WorldCom") Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff Bell Atlantic-Virginia, Inc.'s ("Bell Atlantic") Motion for Partial Summary Judgment is also before the Court. Plaintiff and Defendant are competing carriers who have entered an Interconnection Agreement ("Agreement") pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code). Essentially, the parties dispute

whether local calls to Internet Service Providers ("ISPs")¹ constitute local traffic and are subject to reciprocal compensation under the terms of their Agreement. Bell Atlantic originally filed a complaint against WorldCom for breach of contract and unjust enrichment, and also seeking a declaratory judgment ruling that it is not liable for reciprocal compensation charges on Internet calls. For the reasons stated below, the Court grants Defendant's Motion to Dismiss, and denies Plaintiff's Motion for Partial Summary Judgment, as moot.

I. Facts and Background

Plaintiff Bell Atlantic and Defendant WorldCom² are telephone companies that provide competing local telephone service in Virginia. The Telecommunications Act of 1996 ("the Act") requires competing carriers to interconnect their networks to enable customers of one network to call customers of another. 47 U.S.C. § 251 (1994, Supp. II 1996). The Act imposes certain

¹ISPs are entities which provide their users the ability to access online information over the Internet by communicating with web sites. Illinois Bell Tel. Co. v. WorldCom Tech., Inc., No. 98 C 1925, 1998 WL 419493, at *19 (N.D. Ill. July 23, 1998), *aff'd*, Nos. 98-3150, 98-3322, 98-4080 (7th Cir. June 18, 1999). Internet access enables subscribers to use electronic mail, file transfers, and Internet Relay Chat, as well as to browse and publish on the World Wide Web. *Id.*

²WorldCom was formerly MFS InteleNet of Virginia, Inc.

obligations on all local exchange carriers and requires them to enter interconnection agreements. Id. § 251(b), (c).

Pursuant to § 251(b)(5), competing local telephone companies must make arrangements to pay each other reciprocal compensation for telecommunications. As stated in the regulations, reciprocal compensation only applies to "local telecommunications traffic," or local calls. 47 C.F.R. § 51.701(a) (1998). Local telecommunications traffic is defined as traffic that "originates and terminates within a local service area established by the state commission." Id. § 51.701(b)(1). Simply stated, local calls are calls that originate on one carrier's network and terminate on the other carrier's network, but are within the same local calling area. The two carriers must assist each other in delivering the calls. The Act requires the caller's local carrier to compensate the other carrier whose facilities are used to complete the local call. Reciprocal compensation is the "arrangement between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." Id. § 51.701(e). The reciprocal compensation arrangements for local calls are given effect through the interconnection agreements between the competing carriers.

Pursuant to § 252 of the Act, interconnection agreements can be arrived at through negotiation or arbitration. Any interconnection agreement adopted by negotiation or arbitration must be submitted for approval to the state commission. Id. § 252(a).

In July 1996, Bell Atlantic and WorldCom entered their Agreement based on voluntary negotiations. In October, the Virginia State Corporation Commission ("Virginia Commission") approved the Agreement. Under the terms of the Agreement, Bell Atlantic and WorldCom expressly agreed to pay each other reciprocal compensation for local traffic. See Agreement, § 5.7. The Agreement defines "local traffic" as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that Party's network, within a given local calling area" Id. § 1.44.

WorldCom charged Bell Atlantic for carrying Internet calls originated by Bell Atlantic customers and handed off to WorldCom ISP customers as local calls subject to reciprocal compensation. ISPs provide Internet connections through the telephone network. Illinois Bell, Nos. 98-3150, 98-3322, 98-4080, slip op. at 4. ISPs are assigned local telephone numbers. The telephone companies bill customers for local calls when they call ISPs within the local calling area. Id. However, the ultimate connections are web sites. Generally, the web sites are located

outside of the local calling area in distant locations. Id.

To date, Bell Atlantic has paid reciprocal compensation for ISP calls. However, Bell Atlantic claims that WorldCom violated federal law by collecting "reciprocal compensation" for delivering Internet calls from Bell Atlantic customers to WorldCom ISP customers. In this present action, Bell Atlantic sues WorldCom to recover sums paid for these Internet calls on the theories of breach of contract (Count II) and unjust enrichment (Count III). Additionally, in Count I, Bell Atlantic seeks a declaratory judgment ruling that it was not liable to WorldCom for reciprocal compensation charges on Internet calls. Bell Atlantic requests partial summary judgment on the declaratory relief and as to liability on its breach of contract claim.

WorldCom moves to dismiss the complaint on two grounds. First, WorldCom contends that the Court lacks jurisdiction over the subject matter until the Virginia Commission addresses the issue. Second, WorldCom contends that Bell Atlantic fails to state a claim because it voluntarily paid the reciprocal compensation.

II. Subject Matter Jurisdiction

Primarily, the Court must address Defendant's Motion to

Dismiss for lack of subject matter jurisdiction. The issues presented are: 1) whether § 252(e)(6) of the Act applies in this case and divests the Court of its federal question jurisdiction until determinations are first made by the Virginia Commission; and 2) whether the terms of the parties' Agreement subject their dispute to judicial review.

A. Standard of Review

Pursuant to Federal Rule Civil Procedure 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. The burden in proving subject matter jurisdiction is on the plaintiff. Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). Where subject matter jurisdiction is challenged, the factual allegations are assumed true. Virginia v. United States, 926 F. Supp. 537, 540 (E.D. Va. 1995). The court may look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether subject matter jurisdiction exists. Richmond, Fredericksburg & Potomac R.R. Co., 945 F.2d at 768.

B. The Scope of § 252(e)(6)

Pursuant to 28 U.S.C. § 1331, district courts have original jurisdiction over all cases arising under the Constitution, laws

or treaties of the United States. Section 1331 serves as a general federal question statute and gives district courts original jurisdiction over federally created causes of action unless a specific statute assigns jurisdiction elsewhere. Molinary v. Powell Mountain Coal Co., 125 F.3d 231, 235 (4th Cir. 1997). Thus, the Court has jurisdiction unless a statute specifically vests jurisdiction in another entity.

In the present case, the Agreement between the parties was entered into pursuant to sections 251 and 252 of the Act. Initially, the parties dispute whether the Court's jurisdiction arises generally under 28 U.S.C. § 1331 or under § 252 of the Act. In pertinent part, § 252(e)(6) provides:

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

WorldCom contends that § 252(e)(6) of the Act specifically assigns jurisdiction of issues related to interconnection agreements to state commissions, and in this case, the Virginia Commission. Under § 252(e)(6), WorldCom argues that the district court's jurisdiction attaches only to review the state commission's determination. Furthermore, WorldCom relies on the Federal Communication Commission's (FCC) Declaratory Ruling. According to WorldCom, the FCC Declaratory Ruling stated that, in the absence of any contrary federal law, the issue of reciprocal

compensation for calls to ISPs depends on the terms of the parties' interconnection agreements, as interpreted by the export state agencies. Relying on several decisions from other jurisdictions, WorldCom submits that this Court lacks jurisdiction over the case because Bell Atlantic was required to raise its claims first with the Virginia Commission. Indiana Bell Tel. Co. v. McCarty, 30 F. Supp.2d 1100, 1104 (S.D. Ind. 1998); AT&T Communications of Ohio, Inc. v. Ohio Bell Tel. Co., 29 F. Supp.2d 855, 855-56 (S.D. Ohio 1998); AT&T Communications of Illinois v. Illinois Bell Tel. Co., No. 97 C 0886, 1998 WL 528437, at *4-5 (N.D. Ill. Aug. 18, 1998).

Bell Atlantic contends that federal courts have jurisdiction over claims arising from interconnection agreements because the agreements are the law, not mere contracts. MCI Telecommunications Corp. v. Garden State Inv. Corp., 981 F.2d 385, 387 (8th Cir. 1992). According to Bell Atlantic, nothing in the Act strips the Court of its federal question jurisdiction. Bell Atlantic contends that § 252(a)(6) provides for review of determinations made by state commissions in rejecting or approving interconnection agreements, at the time of creation. Agreement was beyond the approval stages and into performance. According to Bell Atlantic, it seeks relief for breach of the Agreement. Furthermore, Bell Atlantic contends that it seeks

damages, which state commissions do not have the authority to award. Va. Code Ann. § 12.1-13 (Michie 1993). Thus, Bell Atlantic submits that any enforcement jurisdiction that state commissions have does not extend to Bell Atlantic's claims.

Concerning the FCC Declaratory Ruling, Bell Atlantic responds that nothing in the ruling precludes its claims. According to Bell Atlantic, the FCC only said that it would be up to the state commissions to determine in the first instance the effect of the FCC's ruling on their own prior decisions concerning reciprocal compensation for Internet traffic.

Although Bell Atlantic asserts jurisdiction under 28 U.S.C. § 1331, this Court finds that its jurisdictional analysis is limited to the Telecommunications Act. The Supreme Court dictates that where Congress provides a specific and adequate means to seek review of an agency determination, alternative means of review are inapplicable. Califano v. Sanders, 430 U.S. 99, 108-09 (1977) (holding that federal question jurisdiction was precluded by a section of the Social Security Act). See also Southwestern Bell Tel. Co. v. McKee, No. 97-2197-EEO, 1997 WL 450041, at *4 (D. Kan. July 15, 1997) (noting that Califano has been applied in the context of judicial review of the state commission's findings under the Act). In Indiana Bell, the Court expressly rejected the § 1331 argument. 30 F. Supp.2d at 1103 n.2 (finding that the court's jurisdictional analysis was limited

to the Telecommunications Act withstanding the party's reliance on 20 U.S.C. §§ 1331, 1337, 2201, and 2202); see also GTE North Inc. v. Strand, No. 5:97-CV-01, 1997 WL 811422, at *4 (W.D. Mich. June 2, 1997) (refusing to assert jurisdiction under § 1331); GTE Northwest, Inc. v. Nelson, 969 F. Supp. 654, 656 (W.D. Wash. 1997) (finding that under § 252 the district court lacked jurisdiction regarding objections to an agreement submitted to a state commission and that § 1331 was inapplicable).

Under § 252, jurisdiction exists when: 1) the claim regards a state commission determination; 2) the claimant is an aggrieved party; and 3) the claimant seeks review of whether a statement or an agreement between an interconnecting service provider and local exchange carrier satisfies requirements of sections 251 and 252. Indiana Bell, 30 F. Supp.2d at 1103.

In Indiana Bell, the district court held that it lacked jurisdiction to review counterclaims concerning the interpretation of negotiated agreement terms because they had not been raised before the state commission. Pursuant to § 252(e)(6) of the Act, the plaintiff sought review of several of the state commission's arbitration determinations. Id. at 1102. During the same time, a disagreement arose regarding the interpretation of various terms, which had previously been negotiated and agreed upon by the parties. Id. Despite the fact that the parties could have returned to the state commission and the parties had

an arbitration clause in the agreement, the defendant filed a counterclaim seeking a declaratory ruling that its interpretation of those terms was correct. Id.

The plaintiff argued that § 252(e)(6) did not apply because the claims did not regard a "determination" made by the commission. Id. at 1103. Defendant contended that the commission's approval of the parties' agreement, which included approving of the contract language at issue, constituted a "determination" under the section. Id. Plaintiff countered that approving negotiated contract language was not a determination as the Act mandated that the commission approve negotiated contract terms if they complied with a specific statutory requirement. Id.

While acknowledging that the commission made a determination when it approved the agreement and thus brought the jurisdictional analysis under § 252, the Indiana Bell court explicitly found that the proper interpretation of the negotiated terms had not been determined by the commission. Id. at 1104. In support of its decision, the court noted that the goal of the Act was to permit the state commission to make the first determination of issues prior to any judicial review. Id. Other district courts have also noted that the statutory scheme of the Telecommunications Act does not permit judicial review of disputes arising out of interconnection agreements not previously

subject to action by a state commission. See, e.g., AT&T Communications of Ohio, 29 F. Supp.2d at 856-57 (holding that the district court lacked subject matter jurisdiction under the Telecommunications Act where there was no determination of the issue by the state commission); see also AT&T Communications of Illinois, 1998 WL 525437, at *4-5.

In AT&T Communications of Illinois, the court noted that the state commission made a "determination" regarding negotiated contract terms when it approved the agreement. Id. Thus, section 252 governed the court's jurisdictional analysis. However, the court stated that the commission did not make a determination regarding the interpretation of the agreement terms. Id. Thus, as to interpretation, the court lacked subject matter jurisdiction. Id. at *5.

Several parties throughout the country have litigated the issue of whether calls to ISPs require reciprocal compensation. Repeatedly, those cases have first been presented to the governing state commissions. See, e.g., Illinois Bell, Nos. 98-3150, 98-3332, 98-4080 (7th Cir. June 18, 1999); US West Communications, Inc. v. WorldCom Tech., Inc., 31 F. Supp.2d 819 (D. Or. 1998); US West Communications, Inc. v. MFS Intelnet, Inc., No. C97-222WD, 1998 WL 350588 (W.D. Wash. Jan. 7, 1998). In fact, in another case, Bell Atlantic presented the identical issue concerning ISPs and reciprocal compensation to the Virginia

Commission. Final Order, Petition of Cox Virginia Telecom, Inc., Case No. PUC970069 (Va. State Corp. Comm'n Oct. 24, 1997) (finding that ISPs are included for reciprocal compensation).

In this case, Bell Atlantic seeks to determine whether ISPs constitute reciprocal compensation under the terms of the parties' Agreement. Although this dispute does not involve terms arbitrated before the Virginia Commission, the Virginia Commission did make a determination regarding the agreement when it was approved. Thus, the Court finds that § 252 applies. However, the Virginia Commission did not make a determination regarding the interpretation of the claims. This Court finds that the Telecommunications Act was designed to allow the state commission to make the first determination. See Indiana Bell, 30 F. Supp.2d at 1104. Circumventing the state commission's initial review undermines the review process established by Congress in the Telecommunications Act. For those reasons, the Court holds that it lacks subject matter jurisdiction over this dispute until the Virginia Commission makes an initial determination.

C. The Agreement and Jurisdiction

The parties further dispute whether the Agreement specifically provides for judicial review of disputes. Section 29.9 of the Agreement states:

Dispute Resolution. Any dispute between the Parties regarding the interpretation or enforcement of this

Agreement or any of its terms shall be addressed by good faith negotiation between the Parties, in the first instance. Should such negotiations fail to resolve the dispute in a reasonable time, either Party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction.

(Emphasis added). Based on this language, Bell Atlantic contends that the parties bargained for judicial review of this dispute.¹ However, this Court finds that the parties cannot contract for judicial review in direct contravention to the Telecommunications Act. Accord AT&T Communications of Ohio, 29 F. Supp.2d at 856-57 (finding that the Court lacked jurisdiction to decide counts not presented to the state commission despite parties' contractual dispute resolution provision in the Interconnection Agreement). Thus, as this Court presently lacks jurisdiction, Bell Atlantic has not initiated an action in a forum of "competent jurisdiction" as indicated in the Agreement.

As this Court lacks jurisdiction, it is not necessary to address Defendant's alternative grounds for dismissal nor Plaintiff's Motion for Partial Summary Judgment.

¹Alternatively, WorldCom contends that the present dispute is a billing dispute governed by section 29.8 of the Agreement, which requires that the parties follow certain procedures, including arbitration.

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Conclusion

For the reasons stated above, Defendant's Motion to Dismiss is GRANTED. Plaintiff's Motion for Partial Summary Judgment is DENIED, AS MOOT.

ENTERED this 1st day of July, 1999.


Gerald Bruce Lee,
United States District Judge

Alexandria, Virginia
7/1/99

GTE ANALYSIS

| <u>OWED TO GTE</u> | | | | <u>OWED TO COX</u> | |
|-----------------------|--|--|--|----------------------|---------------------|
| <u>DATE</u> | <u>Bill No.</u> <u>E36 HBA-4679 110</u> | <u>Bill No.</u> <u>E36 HBA-4773 109</u> | <u>Bill No.</u> <u>E36 HBN-9816 107</u> | <u>Invoice No.</u> | <u>Amount</u> |
| May-98 | | | | 71899004-D-98135 | 49,204.59 |
| Jun-98 | | | | 71899004-D-98166 | 61,511.10 |
| Jul-98 | | | | 71899004-D-98196 | 61,945.31 |
| Aug-98 | | | | 71899004-D-98227 | 73,612.05 |
| Sep-98 | | | | 71899004-D-98258 | 64,117.59 |
| Oct-98 | | | | 71899004-D-98288 | 53,062.54 |
| Nov-98 | | | | 71899004-D-98319 | 60,619.91 |
| Dec-98 | | | | 71899004-D-98349 | 63,456.47 |
| Jan-99 | | | | 71899004-D-99015 | 99,742.36 |
| Feb-99 | | | | 71899004-D-99046 | 120,852.34 |
| Mar-99 | | | | 71899004-D-99074 | 119,831.18 |
| Apr-99 | | | | 71899004-D-99105 | 117,106.79 |
| May-99 | | | | 71899004-D-99135 | 112,906.52 |
| Jun-99 - | | | | 71899004-D-99166 | 120,578.41 |
| 07/02/1999 | 95.00 | 9,770.08 | 1,204.46 | 71899004-D-99196 | 113,932.47 |
| 08/02/1999 | 484.72 | 8,684.03 | 4,451.35 | 71899004-D-99227 | 125,568.41 |
| 09/02/1999 | 904.95 | 10,483.58 | 3,335.75 | 71899004-D-99258 | 134,769.46 |
| 10/02/1999 | 454.97 | 10,245.72 | 2,990.82 | 71899004-D-99288 | 122,024.28 |
| 11/02/1999 | 1,627.09 | 11,976.91 | 438.52 | 71899004-D-99319 | 137,456.59 |
| 12/02/1999 | 815.54 | 7,315.73 | 67.18 | 71899004-D-99349 | 139,401.70 |
| 01/02/2000 | (144.96) | 6,986.71 | (4,958.06) | 71899004-D-00015 | 141,189.05 |
| TOTAL | 4,237.31 | 65,462.76 | 7,530.02 | | |
| TOTAL OWED GTE | | | | TOTAL DUE COX | 2,092,889.12 |